IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPEAL NO.279 OF 1995

The State of Maharashtra .. Appellant

Vs.

1. Mahadeo Laxman Sarane
2. Raju Laxman Sarane
3. Basu Laxman Sarane
4. Sidhu Laxman Sarane
   All resident of Sulerjavalge
   Taluka Akkalkot,
   District Solapur .. Respondents
   (Org.Accused Nos.1 to 4)

Mr. R.Y. Mirza, APP for Appellant-State.
Ms. V.S. Mhaispurkar h/f Mr. B.G. Vaidya for Respondents-accused.

CORAM: S.S. PARKAR & ANOOP V. MOHTA, JJ.

Date : April 06 & 07, 2005.

ORAL JUDGMENT (Per S.S. Parkar,J.):

1. This appeal is preferred by the State impugning the judgment and order dated 3/2/1995 delivered by the Vth Additional Sessions Judge, Solapur acquitting all the respondents-accused of the offence under Section 302 read with Section 34 of IPC in Sessions Case No.199 of 1994.

2. This prosecution arises in respect of the incident which took place on the night of 26th June 1994 at about 8.30 p.m. in village Sulerjavalge,

Taluka Akkalkot, District Solapur in front of Vithal and Maruti Temple near the Grampanchayat Office. In the said incident one Bhimashankar Madolappa Kapse was murdered when he was assaulted with weapons like sword and dagger. The said incident of assault was witnessed by complainant P.W.5 Kashyappa Kapse, the brother of the deceased, P.W.8 Mallikarjun Kapse, P.W. 12 Babling Patil and P.W. 13 Bharatibai. The deceased had married Kalavati as his first wife 20 years before the incident who was the sister of respondents-accused persons, who are the real brothers. Kalavati had given birth to two children who had died. Thereafter deceased had married P.W. 7 Pushpa. From the second marriage deceased Bhimashankar had two sons and a daughter. After some years deceased Bhimashankar made residential arrangement for Kalavati in village itself and Pushpa was kept separately in the fields. Deceased was neglecting to maintain Kalavati and had also stopped visiting her and, therefore, Kalavati’s brothers, the accused, were annoyed.

3. On the date of the incident when the complainant Kashyappa Kapse P.W. 5, his nephew Mallikarjun P.W. 8, Babling P.W. 12 and his brother Satvirappa were sitting on the Grampanchayat platform

(Katta) opposite Grampanchayat Office the deceased Bhimashankar was proceeding towards his house. When he reached near electric pole near Vithal and Maruti Temple accused persons arrived there. Accused No.1 was carrying sword in his hand while accused no.2 was carrying knife in his hand. Accused Nos.3 and 4 also followed them. They were not carrying any weapons. The witnesses saw accused nos.1 giving blows with sword and accused no.2 stabbing deceased with dagger. The accused were also raising slogans like, "Kamaleshwar Maharaj Ki Jai" and "Valisahab Ki Dostaraoddin" before they ran away from the said place. After the assault on the deceased accused no.1 dipped his palm in the blood of Bhimashankar and made impression of his blood soiled palm on the wall of Gramphanchayat Office. Hearing the noise and the slogans raised by the accused P.W. 13 Bharatibai who was residing nearby had come out of her house and had also witnessed the incident of assault. Sometime after incident Police Patil, Tadval was informed on telephone that Bhimashankar Kapse was murdered at Sulerjavalge at about 8.40 p.m. Police Patil in turn informed Karajgi Outpost on telephone. Head Constable Jadhav P.W. 16, who was in-charge of the said Outpost, immediately sent three constables to the said village and gave information about the same on phone

to Akkalkot South Police Station which was received by Head Constable Ingale. Thereafter Head Constable Jadhav himself also left for the place of incident. He reached there by about 1.30 in the night. After making inquiry, Head Constable Jadhav recorded the complaint of P.W. 5 Kashyappa Kapse which is Exh. 29. On the basis of the said complaint P.W. 16 Jadhav prepared occurrence report Exh.30 and himself went to Akkalkot South Police Station along with the complainant and handed over the complaint as well as occurrence report to PSO Ingale. PSO Ingale registered the offence and sent papers to Sulerjavalge for which place PSI Mujawar had already left. Investigating Officer PSI Mujawar was informed at his residence at about 12.15 a.m. in the night by PC More from Akkalkot South Police Station about the incident. He had, therefore, immediately proceeded for the said village on motorcycle. He had reached there at about 3 a.m. After reaching there he learnt that Head Constable Jadhav had already recorded the complaint of Kashyappa and two constables were guarding the dead body. After receipt of the papers from the police station PSI Mujawar drew inquest panchanama (Exh.13) on the dead body and handed over the dead body to Head Constable Jadhav for taking it to Akkalkot for post mortem. The spot panchanama (Exh.39) was also drawn

under which simple soil as well as soil mixed with blood, blood stained white cap, blood stained slipper pair and leather chappal which were lying on the spot were attached. Thereafter he recorded the statements of P.Ws. 7, 8, 12 and 13. He directed P.W. 16 Head Constable Jadhav to guard the bloody impression of palm on a stone of Grampanchayat Office till finger print expert was brought there. In the morning of 27/6/1994 accused nos.1 and 2 had surrendered to Karajgi Outpost along with blood stained weapons. The blood stained weapons and the blood stained clothes of the accused nos.1 and 2 were attached under panchanama at the said Outpost and the accused nos.1 and 2 as well as the clothes and weapons produced by them were forwarded to Police Station. The stone in the wall of Grampanchayat Office where the impression of bloody palm was left by accused no.1 was removed and attached under panchanama Exh.19 on 28/6/1994. Accused No.3 was arrested on 30/6/1994. Accused no.4 had obtained anticipatory bail and, therefore, he was shown arrested and released on bail on 2/8/1994. The articles attached by the police in the course of investigation, which include blood stained clothes of the deceased and of accused nos.1 and 2, and articles attached under spot panchanama were sent to the office of C.A. for examination in July 1994. After

completion of the investigation charge-sheet was filed in the court of JMFC, Akkalkot and the case was committed to the Sessions Court on 23/9/1994.

4. Before the Sessions Court charge was framed against all the four respondents-accused for offence under Section 302 read with Section 34 of IPC, to which the accused pleaded not guilty. On behalf of the prosecution 18 witnesses had been examined, four out of whom are eye witnesses to the incident including complainant P.W. 5 Kashyappa Kapse, the brother of the deceased. The other eye witnesses are P.W. 8 Mallikarjun and P.W. 12 Babling, who were the nephews of the complainant and the deceased and P.W. 13 Bharatibai, the niece of the deceased. P.W. 2 is Dr.Manohar More, who performed post mortem examination on the dead body. P.W. 7 is Pushpabai Kapse, the second wife of the deceased. P.W. 9 Mohammad Ali Shaikh is Circle Officer and P.W. 18 Dattatraya Kore is Maintenance Surveyor, Karajgi who had drawn map of scene of offence. P.W. 6 Abdul Ingalgi was Sub Engineer while P.W. 18 was Electrical Engineer who deposed about existence of electrical pole near the place of incident. The other witnesses are police witnesses and the panch witnesses. Among police witnesses P.W. 16 is Head Constable Jadhav attached

to the Karajgi Outpost who had gone to the place of incident initially in the night and recorded the complaint of P.W.5 on the basis of which crime was registered. P.W. 17 is PSI Mujawar who investigated the case. The defence of the accused is of total denial. In addition to their statement under Section 313 of Cr.P.C. accused nos.1 and 2 filed their written say at Exh.52 and accused nos.3 and 4 filed their written say at Exh.53. It appears from the said written say that the defence of the accused was that they were falsely implicated in the case on suspicion and that deceased Bhimashankar was man of bad character and was a criminal who was having enmity with many persons in the village and there was dispute about election of Grampanchayat and he must have been attacked by such persons who were on enmical terms with him.

5. It is lamentable that a judicial officer ignoring overwhelming evidence on record of the eye witnesses, whose presence at the place of incident could not have been doubted in view of the fact that in the midnight the police arrived at the scene and the complaint was lodged by one of the eye witnesses naming the weapons used by accused nos.1 and 2 which were produced by the accused nos.1 and 2 themselves

following morning when they surrendered at the police outpost with blood stained weapons as well as the clothes worn by them, has acquitted the accused in the name of benefit of doubt taking the feeble support of minor discrepancies in the evidence of prosecution witnesses. The said order of acquittal is under challenge in this appeal filed against the order of acquittal by the State.

6. With the assistance of the APP we have perused entire evidence on record and heard the defence advocate, who raised the same points which have been used by the trial judge for acquitting the accused.

7. Complainant P.W. 5 Kashyappa Kapse is an elderly person, who was the direct brother of deceased Bhimashankar. He has deposed that on the night of the incident he was sitting on the platform near Grampanchayat Office at about 8.30 a.m. along with his nephews Mallikarjun P.W. 8 and Babling P.W. 12 and his brother Satvirappa. At that time Bhimashankar was proceeding towards his house. When he arrived near the lamp pole near Vithal and Maruti Temple accused no.1 wielding sword and accused no.2 wielding

dagger (Jambiya) came there. They were followed by accused nos.3 and 4 who were not carrying any weapons with them. He saw accused no.1 assaulting Bhimashankar on his neck with a sword and accused no.2 stabbing deceased in his stomach with a dagger. Accused nos.1 to 4 raised slogan, "Kamaleshwar Maharaj Ki Jai". Accused No.2 soiled his palm into the blood of the deceased which had oozed out at the place of incident and created impression of his blood soiled palm on the wall of Grampanchayat Office and then raised another slogan, "Valisahab Ki Dostaraoddin" Thereafter all the accused went towards Bankalgi road. The witness and his brother and nephews, who were sitting with him, went to see Bhimashankar who had succumbed to his injuries. They saw injury on his neck, shoulder and the intestine having protruded out of the stomach and the blood spread over the ground at the place of the incident. They raised hue and cry and the people gathered. His evidence is supported by his two nephews P.Ws. 8 and 12 who were also sitting along with him on the platform (Katta) outside the Grampanchayat Office.

8. P.W. 8 Mallikarjun Kapse, a boy hardly 15 years old, who was at that time studying in 10th standard has deposed that deceased Bhimashankar was

his uncle. The incident had taken place on the night of 26/6/1994 at about 8.30 p.m. when he along with the complainant, P.W.12 Babling and Satvirappa were sitting on the platform of the Grampanchayat Office and were chitchatting. That time deceased was proceeding towards his house in the field and passed from the field in front of them. When he walked hardly a distance of about 100 ft. and reached near the Vithal Temple, accused nos.1 and 2 armed with sword and dagger respectively followed by accused nos.3 and 4 arrived there. Accused no.1 assaulted deceased with sword on his neck as a result of which Bhimashankar fell on the ground. Accused no.2 stabbed in the stomach of Bhimashankar with a dagger. Bhimashankar died on the spot. Accused no.1 soiled his palm in the blood of deceased and went to the Grampanchayat Office and made impression of blood stained palm on the wall of Grampanchayat Office raised slogans and then all the accused went towards Bankalgi road.

9. P.W. 12 Babling Patil is also nephew of the deceased and was hardly 22 years old. He has deposed that he, the complainant, Mallikarjun and Satvirappa were sitting on the platform of Grampanchayat Office. That time Bhimashankar was going to his house in the

field. When he reached near Vithal and Hanuman Temple accused no.1 armed with sword, accused no.2 armed with dagger came from front side of Bhimashankar. They were followed by accused nos.3 and 4. Accused no.1 assaulted Bhimashankar with sword on his neck and when he fell down accused no.2 stabbed Bhimashankar in his stomach. Accused raised the slogan, "Kamaleshwar Maharaj Ki Jai". He also deposed that accused no.1 got his hand soiled in the blood of the deceased and made impression on the wall of Grampanchayat Office and shouted, " Valisahab Ki Dostaraoddin". Thereafter they proceeded towards Bankalgi road.

10. Last eye witness is P.W. 13 Bharatibai, who is also niece of the deceased. Her family is running a flour mill. Her residential house as well as flour mill run by her family is hardly 18 ft. from Vithal Temple. She also heard slogan raised by the accused persons, "Kamaleshwar Maharaj Ki Jai" and hence she came out of the house on the road when she saw accused nos.1 and 2 assaulting her uncle Bhimashankar with weapons in their hands. She saw accused nos.1 and 2 running towards Grampanchayat Office after the assault on the deceased. Bhimashankar had received injuries on his neck and stomach and his intestine had come out.

11. The evidence of the complainant has been corroborated by three eye witnesses in essential particulars. His evidence is also corroborated by the F.I.R. lodged in the mid-night when the Head Constable Jadhav P.W. 16 arrived on the scene at about 1.30 same night. The F.I.R. Exh.29 mentions the manner in which the incident took place. There is reference to the accused nos.1 and 2 arriving at the place of offence armed with sword and dagger respectively followed by accused nos.3 and 4 when deceased was on his way back home in front of Vithal and Maruti Temple. There is mention in the complaint of the names of other eye witnesses who were sitting along with the complainant on the platform opposite Grampanchayat Office. The assault is attributed to accused nos.1 and 2 and thereafter accused no.1 soiled his palm in the blood of the deceased and left the impression on the wall of Grampanchayat Office. There is also reference to all the accused raising slogan, "Kamaleshwar Maharaj Ki Jai" and accused no.1 raising slogan, " Valisahab Ki Dostaraoddin". After leaving impression of his blood soiled palm on the wall of the Grampanchayat Office by accused no.1 all of them left the place. Since deceased had passed from the path in front of the platform where the witnesses were sitting

and the accused also, after the assault, had gone near the office of Grampanchayat before leaving the place, the witnesses had the opportunity to see all the accused persons from close quarters armed with blood stained weapons and that is enough to conclude that it was accused nos.1 and 2 who had assaulted the deceased, even if it is assumed that the witnesses for any reason could not have seen the actual assault on the deceased. If the assault had not been seen by the witnesses, the complainant would not have been in a position to give the particulars of assault in the complaint lodged same night that accused no.1 Mahadeo had assaulted deceased with a sword and accused no.2 Raju had stabbed the deceased with a dagger.

12. The evidence of eye witnesses is also corroborated by the finding of impression of the bloody palm on the wall of the Gramphanchayat Office which is mentioned in the complaint as well as in the evidence of all the eye witnesses. Head Constable Jadhav P.W. 16 has deposed that I.O. told him to keep the stone, on which the accused had made impression of palm, in proper and safe condition till finger print expert arrived. The finger print expert had arrived on 28/6/1994 and stone was attached under panchanama Exh.19 after removing it from the wall of

the Grampanchayat Office. This is also supported by the evidence of panch Appasaheb Lohar P.W.11. He had acted as panch on 28/6/1994. He had removed the stone having impression of blood soiled palm which was wrapped in a paper and seized under panchanama Exh.19. Thus the evidence of eye witnesses, corroborated by the F.I.R., is further corroborated by the seizure of the stone from the wall of Grampanchayat Office having the blood impression of the palm.

13. The evidence of the eye witnesses is also corroborated by the medical evidence. The prosecution has examined Dr. More P.W. 2 who had conducted autopsy on the dead body on 27/6/1994 in the evening. He has proved the post mortem notes. The post mortem notes are produced on record at Exh.22. As per column no.17 of the post mortem notes the deceased had received 12 external injuries which are as follows:-

1. Incised cut wound behind left ear 3 x 2 cm. deep bone.

2. Incised cut wound 20 x 6 cm. left side neck horizontal extending below left ear out mandible deep exposing muscle torm cut end of vessels, bone, mandible contaminated, spindle shaped.

3. Incised cut wound 10 x 3 cm. below inj. No.2 deep up to lat aspere vertebra and trachea exposing all underneath muscle, cut

vessels, tendon, contaminated - spindle.

4. Incised cut wound spindle shaped over Rt. side of face and neck angle of Rt. eye to Rt. eye to Rt. lat. of nape of neck-degloing, exposing underneath muscle, vessels, tendon, contamination, blood clots oblique 17 x 3 cm.

5. I.W. mid sternum 3 x 2 cm deep chest cavity horizontal spindle shaped.

6. I.W. 6 x 2 cm. Lt. lateral to chest, spindle shaped.

7. I.W. epigastric Lt. side abdomen 4 x 2 cm deep cavity 4 x 2.

8. I.W. below above injury 5 x 2 cm cavity deep.

9. I.W. Lt. lat to umbilicus 10 x 2 cm cavity deep, int. mudy coile coming out horizontal.

10. I.W. Lt. iliac fossa 5 x 2 cm cavity deep.

11. I.W. below inj. No.10, 5 x 2 cm. cavity deep.

12. I.W. below inj. No.11, 5 x 2 cm cavity deep.

. There is a cut wound on the neck behind the left ear. There is also cut wound on the side of neck. The injuries are stated to be grievous and ante mortem in nature. The post mortem notes also mention in column no.21 the internal injuries on the dead body in the nature of cut and tear corresponding to external injury nos.7 to 12. According to the Medical Officer the cause of death was shock due to multiple incised cut wounds to the vital organs, lungs, heart,

chest, abdomen deep following haemorrhagic shock. The Medical Officer has deposed that injuries on the head and neck of the dead body were possible by use of sword (article no.16/6) and injuries on chest and abdomen were possible by use of dagger/jambiya (article no.16/7). He has further deposed that the injuries on the dead body which are mentioned in the post mortem report were sufficient in the ordinary course to cause the death instantly. Thus the mention of the assault by use of weapons like sword and dagger in the complaint is corroborated by the medical evidence.

14. The evidence of the eye witnesses is further corroborated by a very telling circumstance of the recovery of the blood stained clothes of the accused nos.1 and 2 at the time of their arrest when they surrendered to the Karajgi Outpost at about 11 a.m. on the following day and the recovery of blood stained sword and dagger from them at the time of their arrest. In that respect prosecution has led the evidence of panch Subhash Gotul P.W. 3. As per the evidence of Head Constable Ingale attached to Akkalkot South Police Station at about 11 a.m. on 27/6/1994 accused nos.1 and 2 arrived at the police station of Akkalkot. Accused no.1 was carrying blood stained

sword in his hand and accused no.2 having blood stained knife in his hand. Head Constable noticed that their clothes were also blood stained. They reported to him about assault made by them on the deceased. He, therefore, called two panchas P.W.3 Subhash Gotul and one Shivanand and attached sword Exh."F" from accused no.1 and knife Exh."G" from accused no.2 and their blood stained clothes under panchanama Exh.25. The clothes of accused no.1 which were attached under said panchanama were blood stained cap, shirt and dhoti marked as Exhs."H", "I" and "J" respectively, while from the person of accused no.2 blood stained shirt Exh."K" was attached. His evidence is supported by panch Subhash Gotul P.W.3. He has deposed that he was called at the police station along with one Shivanand to act as panch. Accused nos.1 and 2 reported about the incident. Accused no.1 produced sword while accused no.2 produced dagger. Both the weapons were having blood stains. The clothes of the accused were also having blood stains. The clothes on the person of accused no.1 i.e. cap, shirt and dhoti and shirt from the person of accused no.2 were removed and were seized under panchanama Exh.25. According to the I.O. weapons as well as the clothes of the accused nos.1 and 2 along with clothes of the deceased and the

articles which were seized under spot panchanama from the place of offence were sent to the office of C.A. along with constable Waghmare P.W. 15 on 14/7/1994 in sealed condition. Thereafter the C.A. reports were received. As per the C.A. report dated 30/9/1994 Exh.48 earth mixed with blood and the pair of slippers as well as the clothes of the deceased which were shirt, banian, dhoti and underwear were found stained with blood of group "O". Similarly, the clothes of accused no.1 which were attached at the police station being cap, full shirt and dhoti were found stained with blood of group "O". Similarly, full open shirt of accused no.2 also was found stained with blood of group "O". Both the weapons used by the accused nos.1 and 2 for assault i.e. sword and dagger were also found stained with blood of group "O". The evidence of the police officer is squarely and fully supported by the panch P.W.3. There is no doubt that accused nos.1 and 2 surrendered to the police station following morning along with blood stained weapons and the clothes which they were wearing were also blood stained and, therefore, they were also attached under panchanama Exh.25. Thus, the finding of same blood group which was found on the clothes of the deceased is a very strong circumstance which supports and corroborates the evidence of eye witnesses about the

participation of accused nos.1 and 2 in the assault on the deceased on the night of the incident. Except denying as false the accused have not given explanation either in their 313 statement or in the written say filed by them about the finding of blood of group "O" on their clothes and the weapons produced by them at the police station. One reason which one can contemplate for the accused voluntarily surrendering to the police station on the following day may be because they knew that they were seen by the complainant and the other persons present at the time of the incident assaulting the deceased.

15. In a case of this kind where there is evidence of eye witnesses not one, two, three but four corroborated by the immediate complaint lodged in the night and the medical evidence and the circumstances like the seizure of blood stained clothes from the persons of accused nos.1 and 2 and the blood stained weapons from their hands when they surrendered to the police station following morning and the finding of blood of group "O" on those weapons and their clothes which was also the blood found on the clothes of the deceased and the articles seized from the place where the dead body was lying, there was no need to prove or lead any evidence with regard to the motive.

16. However, as regards motive, the complainant, who was the brother of the deceased, has deposed that the accused who are the real brothers inter se and the brothers of the first wife of the deceased by name Kalavati were annoyed with the deceased because he was not looking after their sister Kalavati after the deceased had married P.W.7 Pushpa. The complainant P.W.5 has deposed that initially two wives stayed under the same roof, however, later on deceased had made separate arrangement for the stay of Kalavati, who is the sister of the accused, in the village Sulerjavalge. But after sometime she had to stay with her parents as deceased Bhimashankar had stopped maintaining her as a result of which the accused started quarrelling with deceased. P.W. 7 Pushpa, the second wife of the deceased, has deposed that accused nos.1 to 4 raised quarrel with deceased Bhimashankar and, therefore, he had stopped paying maintenance to Kalavati and since 2-3 years prior to the date of incident accused used to threaten Bhimashankar. The trial judge has commented on the evidence of motive being feeble as if there was no other evidence except the evidence of motive led by the prosecution on the basis of which prosecution was prosecuting the accused for the offence of murder. If

the version of eye witnesses is accepted and we see no reason to disbelieve the eye witnesses whose evidence is corroborated and supported, as observed earlier, the prosecution case did not depend on the proof of motive against the accused. The prosecution is not required to establish motive beyond reasonable doubt. The motive as suggested by the prosecution, in the circumstances of the case, undoubtedly appears to be sufficient for the accused to take law in their hands. Accused were annoyed because the deceased who had taken second wife was not maintaining or looking after their sister Kalavati, the first wife of the deceased. As observed earlier, if the evidence of eye witnesses is accepted the accused can be convicted even in the absence of any evidence of motive.

17. The trial judge has, however, observed that the evidence led by the prosecution to prove the motive is absolutely inconsistent and unacceptable because though the complainant has stated in examination-in-chief that because deceased had stopped looking after the maintenance of his first wife Kalavati the accused were angry with the deceased and, therefore, they attacked him, in the cross-examination he had admitted that he had no personal knowledge about the dispute between Bhimashankar and the accused

about providing maintenance to Kalavati. The trial judge has laid emphasis on the admission of the witness that alleged strained relations were not known publicly and, therefore, he finds the evidence regarding motive led by the prosecution unnatural and unacceptable. The learned Judge also points out that P.W. 7 Pushpa had made improvements in her evidence about the motive and P.W.8 Mallikarjun and P.W. 12 Babling though were close relations had not stated anything about the motive forgetting that these two boys were quite young hardly 16 and 22 years of age respectively and were nephews of the deceased and, therefore, may not be knowing about the provision for maintenance of Kalavati by the deceased.

18. The trial court has also held that there was delay in filing the F.I.R. even in the face of some of the judgments of the Supreme Court cited before it. Whether there was delay or not in filing F.I.R. is a question of fact and depends on the facts and circumstances of each case. The incident had taken place in a very small village which is about 22 kms. away from Akkalkot having no police station. The police outpost is situated at Karajgi which is also at a distance of about 7 kms. from the village where the incident took place. One cannot be oblivious of the

fact that the incident of murder had taken place in the night in a remote village. Somebody had informed the Police Patil Suresh Tadalge of Tadval. He had informed about the said incident to Karajgi Outpost on telephone and, therefore, Head Constable Jadhav P.W. 16 first sent three constables to the said village and thereafter informed Akkalkot Police Station where the message was received by Head Constable Ingale. Thereafter the Head Constable left for that village and reached the place of offence about 1.30 in the night though he had received the message at 11.45 on that night. How the trial judge then expected these villagers to reach the police station or even the police outpost at Karajgi at a distance of about 7 kms. in the night leaving the dead body at the place of offence when they had seen a ghastly murder committed by the accused persons openly wielding weapons like sword and dagger in their hands. Even the road was stated to be rough.

19. The trial judge has also, by referring to the evidence of young witness Babling P.W. 12 who had stated that police had arrived at 2 - 2.30 in the midnight, observed how the F.I.R. could have been recorded at 1.30 a.m. in the midnight. Trial Court here did not consider the evidence of Head Constable

Jadhav P.W. 16 who had stated that he had reached the place of incident at about 1.30 a.m. in the midnight. He has deposed that he had left the police station for the purpose of going to the place of incident at about 12.30 a.m. from Karajgi, that is the place hardly 7 kms. away. The trial judge had expected these witnesses to go on foot to Karajgi outpost in the night though somebody had informed the Police Patil who in turn had given message on telephone to the Karajgi Outpost. The learned Judge has also not considered that there must be want of or means of transport facility from the village where the incident took place to the police station or even to go to Karajgi outpost. The finding of the trial judge that there was delay in filing the F.I.R. is, therefore, unacceptable as it ignores the ground realities.

20. The trial judge has not accepted the evidence of eye witnesses on various trifle grounds. Firstly, he observed in paragraph 55 of the judgment that since the complainant was the brother of the deceased it could safely be said that he must have animus towards the assailants whoever they may be although the judgment of the Supreme Court in the case of Darshan Singh and anr. vs. State of Punjab reported in **AIR 1988 SC 747** was cited before him. In that case it was

observed that when names of eye witnesses were mentioned in the first information report which was lodged immediately and if the statements of eye witnesses are fully corroborated by the medical evidence, no doubt could be raised about the reliability of such evidence. This is inspite of the fact that the learned Judge was aware, as mentioned in para 56 of his judgment, that the complainant was also related to the accused who were the sons of his own sister. The trial court does not accept the evidence of complainant because though he was related to both the sides he has shown ignorance whether Kalavati had resorted to judicial proceeding against deceased Bhimashankar or not. According to Trial Court because the deceased was not maintaining Kalavati, therefore, the witness was unwilling "to put all the cards before the Court". The trial judge does not rely on the evidence of P.W.5 and the other eye witnesses because they had not raised hue and cry when assault was in progress though the witness stated that it was not possible for him to raise hue and cry as at the time of the assault he was frightened. The learned Judge ought to have appreciated that the reaction to an incident especially murderous assault differs from person to person. Complainant himself was of the age of 65 years while the other two witnesses were boys

hardly 16 and 22 years old, though they were also accompanied by another brother of Kalavati. But the accused also were four in number and two of them were armed with deadly weapons like sword and dagger. How the learned Judge expects these persons either to intervene in the said assault or to raise hue and cry and invite trouble for themselves. When the accused had come determined to assault the deceased armed with dangerous weapons, the witnesses were not expected to intervene because in all probability they would have been the next target of assault by the accused. There was nothing surprising if the witnesses had kept quiet that time and their conduct cannot become unbelievable for keeping quiet as observed by the trial judge. The trial judge has also referred to the discrepancies in the number of assaults attributed to the accused by different eye witnesses and has, therefore, disbelieved the eye witnesses. He observed that there was improvement in the evidence of the witnesses as to the number of assaults made by each of the two accused persons on the deceased and that all the witnesses had not given uniform evidence as regards the number of assaults made by each of the two accused persons. He, therefore, finds contradictions between the evidence of eye witnesses and the medical evidence because as per the medical evidence there were 12 external

injuries on the person of the deceased but the witnesses have spoken about 3 to 5 assaults only which could not have resulted in 12 injuries. This observation was made in the teeth of the judgment of the Supreme Court cited before the learned Judge in the case of Boya Ganganna and anr. vs. State of Andhra Pradesh reported in **AIR 1976 SC 1541** in which it was observed that minor contradictions were bound to appear when the ignorant and illiterate women are giving evidence and even in case of trained and educated persons, memory sometimes plays false. The trial judge forgot that the witness's attention was drawn because of the slogans raised by the accused and they were not at the place of incident posted as observers to minutely observe and count the number of assaults made by each accused persons on the deceased.

21. The trial judge has also disbelieved the witnesses because the complainant has deposed that after the assault slogan was raised while other witness deposed that his attention was drawn after hearing the slogan raised by the accused and, therefore, according to the learned judge, he could not have seen the assault. Whether the first slogan, "Kamaleshwar Maharaj Ki Jai" was raised either before the assault commenced or in the midst of the assault,

it is enough that the witnesses had seen accused assaulting the deceased giving one or more blows. Secondly, even if actual assault is not seen by any of the witnesses but their attention was drawn soon after the assault was complete and the witnesses had seen the accused wielding blood stained weapons in their hands at the place where deceased was assaulted and had fallen down, the involvement of the accused in the assault cannot be doubted. As far as another slogan is concerned i.e. "Valisahab Ki Dostaraoddin " it was raised according to the witnesses by accused no.1 after he put the impression of his blood soiled palm on the wall of Grampanchayat Office.

22. The trial judge has also disbelieved the witnesses on the ground that the witnesses sitting at about 150 ft. away from the place of the incident could not have seen the actual assault and there is no satisfactory evidence about the lights being there. The prosecution has led evidence of P.W. 6 Abdul Ingalgi the Sub Engineer of MSEB which supplies electricity to the said village. He has deposed that on 26/6/1994 at about 8.30 p.m. there was supply of electricity to village Sulerjavalge. Pursuant to query put to MSEB by the I.O. the office of MSEB had written to the PSI of Akkalkot South Police Station

that on 26/6/1994 at about 8.30 p.m. there was supply of electricity to the said village. There is also evidence of P.W. 18 Dattatray Kore who had drawn the map of scene of offence Exh.62. He has deposed that there were three electricity poles as shown in the map. Exhibit 62 shows that one electricity pole was near the Grampanchayat Office and the platform where the witnesses were sitting. Second electricity pole was at the place of offence itself and the third electricity pole was in between these two places. There is small road leading from the place where the witnesses were sitting upto and behind the place where the incident took place and dead body was lying. There is no obstruction in between the two places. It being night time when two persons were assaulting the deceased even before they raised the slogans, the witnesses' attention must have been drawn to the place of incident and there being no obstruction in between to see the assault the witnesses could have seen the assault and identified the accused who were known to them. In any event the accused after assault had gone near the office of the Grampanchayat where the witnesses were sitting and, therefore, they could have very well seen the accused from close quarters in the light. There is also evidence that in that area there were shops and residential houses and, therefore, the

place could not have been so dark that accused could not have been identified.

23. It is significant to point out that while the trial judge refers to the existence of shops and residential premises in the vicinity of the place of the incident for the purpose of drawing adverse inference as to why independent witnesses were not examined, yet he refers to the admission of the witness in the cross-examination that the shops were closed that time and, therefore, there must have been no light to enable the witnesses to see and identify the accused.

24. It is well settled that examining independent witnesses is not indispensable and the witnesses cannot be disbelieved merely because they are relatives. The witnesses cannot be said to be interested simply because they happen to be the relatives of the deceased. The trial court has also observed that since the witnesses were sitting on the platform (Katta) and if the position of the road is considered the witnesses must be facing towards South and, therefore, they could not have proper and clear view of the incident. As observed earlier, the

distance between the place where the witnesses were sitting and the place of offence was not much. The accused were known to the witnesses and immediately after the assault accused had gone near Grampanchayat Office where the witnesses were sitting and, therefore, they could see the accused with blood stained weapons in their hands. If the witnesses had not seen the accused they would not have been named in the complaint filed in the night. There is also mention of the weapons in the complaint which were recovered on the following day from the accused persons when they surrendered to the police station with their clothes stained with blood.

25. The trial court has also referred to the non-examination of one Tarbhai Husainbhai Korbu whose name was mentioned in the complaint itself for being near the place of offence when the crime was committed. Because the other witnesses must not have seen him and, therefore, his presence was not referred to by them. That cannot falsify the evidence of eye witnesses nor the said circumstance can be said to be a ground to doubt whether these witnesses were eye witnesses to the incident in question as held by the trial court. The said person may not have seen the incident as such or he might have denied to the police

that he had witnessed the incident of assault. No question was asked in the cross-examination of the I.O. as to whether his statement was recorded by the police or not. In any way it is common knowledge that in matter of assault like this even if some persons from the locality happened to witness the incident they do not choose to come forward to give statement to the police. Even if they give statement they don't stick to it at the time of trial. Ultimately it is the relations of the deceased who alone can be depended upon by the prosecution to prove the guilt of the accused. From the record it appears that statement of Tarbhai was recorded by the police on the following day of the incident. The copy of that statement must have been served on the accused as a part of charge-sheet. May be the witness was not available at the time of trial, but the defence knowing it that he was also an eye witness to the incident as per his police statement did not choose to ask any question to the I.O. about the reason for non-examination of said witness.

26. The trial court has observed that in case the eye witnesses were present at the place of offence, deceased would have seen them while passing from in

front of them and in that case when he was assaulted he would have rushed towards them for his safety. That is very easy to say sitting in the court room. The deceased was surrounded by four accused persons all of whom were brothers and must be having animus against him because of his neglect to maintain their sister Kalavati who was the first wife of the deceased. Two of the four accused were armed with deadly weapons and had started assaulting deceased. The initial blows were stated to be given by accused no.1 on the neck of the deceased which must have resulted in profuse bleeding because of which he collapsed and then he was stabbed in the stomach by accused no.2. There was, therefore, no occasion for the deceased to go towards the eye witnesses for his safety.

27. The trial court has also disbelieved the evidence of P.W. 13 Bharatibai on the ground that when she was busy preparing dinner and her mother-in-law was watching T.V. she would not have been in a position to hear anything which was going on on the road because of the adjacent flour mill. The residence of the said witness was just adjacent to the temple in front of which the incident took place. One

has to presume so many things before discarding the evidence of the said witness. On the one hand the trial judge expected that the people from the area having residential houses as well as shops must have assembled and also witnessed the incident but on the other hand he disbelieves P.W. 13 when she states that she came out of her house after hearing slogans raised by the accused persons. Accused had not committed offence secretly but in an open place in the locality where there were residential houses as well as shops by raising slogans as if they had committed the murder in the name of Kamleshwar Maharaj in whose name they had raised slogan. It is well known that slogans are always raised at the top of ones voice and, therefore, there should not have been difficulty for the witness to hear the commotion going on just outside her house which according to the witness was hardly few feets away from her residence. Her evidence is also discarded because the eye witnesses had not disclosed her name. It is possible that the witnesses may not have seen P.W. 13 Bharatibai having come out of her house and witnessed the incident. By that time so many other persons also must have come out and, therefore, her presence may not have been noticed by the other eye witnesses she being one of the many persons having come out on the road due to

the commotion. After all what the witness Bharatibai had seen was the assault by accused no.2 and then both accused nos.1 and 2 were seen running away towards Grampanchayat Office. Her name may not have been mentioned by the other witnesses as she was after all a lady.

28. There can be no doubt that even if the evidence of eye witnesses other than the complainant is excluded, the evidence of complainant P.W. 5 Kashyappa Kapse corroborated by the immediate complaint lodged by him and further corroborated by the medical evidence and the recovery of blood stained weapons and clothes of accused nos.1 and 2 goes to prove the prosecution case beyond any shadow of doubt as regards the brutal assault made by accused nos.1 and 2 on deceased with weapons like sword and dagger.

29. The reasons given by the trial court for discarding the evidence of four eye witnesses cannot sustain in law. The evidence of the eye witnesses cannot be discarded on the ground that they were chance witnesses and had no reason to be near the Grampanchayat Office that evening when their

residences were hardly at a distance of 1 or 2 kms. Merely because the complainant was 65 years old it cannot be said that his young nephews would not sit in his company chit-chating there. If the complainant had not witnessed the incident one would fail to explain howcome the complainant had made a mention of the weapons wielded by accused nos.1 and 2 in the complaint itself which was lodged same night.

30. In the penultimate paragraph of the judgment the trial court has observed that since the deceased was having enmity with other villagers to the extent that he was required to keep revolver with him for his safety, there was probability of his being assaulted by his enemies. That is too far fetched probability and is without any foundation. One cannot expect the close relations to involve falsely the accused persons in a murder case without having seen them assaulting only on the ground of motive which according to the trial judge himself was feeble. The said reasoning does not at all take into consideration or explain the recovery of blood stained clothes and the weapons from the accused nos.1 and 2 when they voluntarily surrendered to the police station following morning. As observed earlier they must have surrendered to the

police station knowing that they cannot escape their arrest because they had been seen assaulting the deceased by the witnesses. Thus, the entire reasoning of the trial judge is inconsistent with the evidence on record and, therefore, it can be said to be perverse, illegal and unreasonable and thus liable to be set aside in an appeal against acquittal. In order to interfere in an order of acquittal it is not necessary to give finding that the reasoning of the trial court is perverse but it is enough if the reasoning of the trial court is found to be unreasonable and illegal by the appellate court.

31. The question which remains to be considered is whether all the accused can be held guilty of the offence of murder by virtue of Section 34 of IPC. Accused nos.3 and 4 had followed accused nos.1 and 2 and had not come in the company of accused nos.1 and 2. Accused nos.3 and 4 had not carried any weapon with them. Had the accused nos.3 and 4 shared common intention of accused nos.1 and 2 they would have gone to the place of incident armed with some weapons. It would, therefore, be difficult to ascribe common intention to accused nos.3 and 4 along with accused nos.1 and 2 to murder Bhimashankar. Accused nos.3 and

4 are, therefore, entitled for benefit of doubt.

32. From the evidence on record there can be no doubt that the act of accused nos.1 and 2 was intended to commit murder of the deceased. Both of them had assaulted with dangerous weapons on the vital parts of the body of the deceased. While accused no.1 used sword on the neck of the deceased, accused no.2 pierced dagger repeatedly in the stomach of the deceased as a result of which the vital organs like lungs and heart had been wounded which caused the death of the deceased. As a result of the assault the intestine of the deceased had also come out. The act of the accused nos.1 and 2 was, therefore, intentional as a result of which Bhimashankar met with an instantaneous death on the spot itself and, therefore, both the accused nos.1 and 2 are liable to be convicted for offence under Section 302 read with Section 34 of IPC. Since the offence is not of rarest of rare cases death penalty is ruled out.

33. In the result, the appeal is allowed against Respondent nos.1 and 2 i.e. Original accused nos.1 and 2 and dismissed against Respondent Nos.3 and 4

i.e. Original accused nos.3 and 4.

. The order of acquittal of Respondent nos.1 and 2 i.e. Original Accused Nos.1 and 2 is set aside and they are convicted for offence under Section 302 read with Section 34 of IPC and sentenced to RI for life and to pay a fine of Rs.1000/- each in default to suffer further imprisonment for a period of three months.

. The order of acquittal of respondent nos.3 and 4 i.e. original accused nos.3 and 4 is confirmed. Their bail bonds shall stand cancelled.

. On the application of Ms. Mhaispurkar respondent nos.1 and 2 i.e. original accused nos.1 and 2 are given two weeks time to surrender to their bail bonds.

(S.S. Parkar, J.)

(Anoop V. Mohta,J.)